85-1539

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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(1) Case Number: _____

(2) SUPREME COURT OF THE UNITED STATES

(3) Term: Oct. 1985

(4) Caption:

ANTHONY L. GINOCCHI, Appellant

v.

BURRELL SCHOOL DISTRICT, Appellee

(5a) On Appeal from the

(5b) Supreme Court of Pennsylvania

(6) JURISDICTIONAL STATEMENT

(7) Counsel of record for Appellant:

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JURISDICTIONAL STATEMENT

(a) The questions presented by the appeal

Question 1.: Is there due process, if a school board first passes a resolution demoting an employee and then gives the employee a hearing before it on the correctness of the demotion?

Question 2.: Is 24 Purdon's Statutes Sect. 11-1151 governing demotions of a school's tenured professional employees in Pennsylvania so vague as to be unconstitutional?

(b) List of all parties in the lower court

The parties in the lower court were Anthony L. Ginocchi, the appellant here, and Burrell School District, the appellee here. In view of the constitutional questions, LeRoy S. Zimmerman, Esq., Attorney General, Commonwealth of Pennsylvania, was given notice of the proceedings.

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(d) Reference to reports

To the best of counsel's knowledge, none of the opinions in the courts or administrative bodies below have been reported in either official or unofficial reports.

(e) Grounds for jurisdiction

(i) This is an appeal from the

decision of the Supreme Court of Pennsylvania not to grant relief on the basis of violation of the Appellant's constitutional rights as emcompassed by the two questions presented above.

(ii) The judgement or decree sought to be reviewed was entered Jan. 23, 1986. The notice of appeal was filed March 12, 1986, in the Supreme Court of Pennsylvania.

(iii) The statutory provision believed to confer jurisdiction of the appeal on this Court is 28 U.S.C. Section 1257.

(f) The constitutional and statutory provisions that the case involves

The case involves Amendments 5 and 14 of the U.S. Constitution, reading in pertinent part as follows:

"5. No person shall ... be deprived of life, liberty, or property,

without due process of law ...."

"14. [N]or shall any State deprive any person of life, liberty, or property, without due process of law ...."

The case also involves Section 1151 of the Pennsylvania Public School Code, 24 P.S. Sect. 11-1151, reading in pertinent part:

> [T]here shall be no demotion of any professional employee either in salary or in type of position, except as otherwise provided in this act, without the consent of the employee, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employee.

The reference to dismissal involves 24 P.S. Sects. 11-1127, and -1129 as follows:

> Section 1127. Procedure on Dismissals; Charges; Notice; Hearing. Before any professional employee having

attained a status of permanent tenure is dismissed by the board of school directors, such board of school directors shall furnish such professional employee with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing. A written notice signed by the president and attested by the secretary of the board of school directors shall be forwarded by registered mail to the professional employee setting forth the time and place when and where such professional employee will be given an opportunity to be heard either in person or by counsel, or both, before the board of school directors and setting forth a detailed statement of the charges. Such hearing shall not be sooner than ten (10) days nor later than fifteen (15) days after such written notice. At such hearing all testimony offered, including that of complainants and their witnesses, shall be recorded by a competent disinterested public stenographer whose services shall be furnished by the school district at its expense. Any such hearing may be postponed, continued or adjourned.

> Section 1129. Vote Required for Dismissals. After fully hearing the charges or complaints and hearing all witnesses produced by the board and the person against whom the charges are pending, and after full, impartial and unbiased consideration thereof, the board of school directors shall by a two-thirds vote of all the members thereof, to be recorded by roll call, determine whether such charges or complaints have been sustained and whether the evidence substantiates such charges and complaints, and if so determied shall discharge such professional employee. ....

(g) Concise statement of the case

Appellant, Mr. A.L. Ginocchi, is, and was in 1980, a permanently tenured professional employee under contract with the Burrell School District, Appellee.

Following a series of closed meetings at which the demotion of Mr. Ginocchi was discussed, the Board of the Burrell School District passed without discussion at a public meeting on July 14,

1980, a resolution demoting Mr. Ginocchi from elementary school principal to teacher. Mr. Ginocchi was not present at the closed meetings; he was not invited, nor was he ever given any notice that the closed meetings were scheduled. Mr. Ginocchi was given a hearing after the July 14, 1980, vote. The hearing was held on August 21, 1980, and Sept. 4, 1980, before the Board. Following the hearing, the Board voted to sustain the resolution it had earlier passed on July 14, 1980. Question 1. was raised as an objection before the hearing; the objection was denied. Both Questions 1. and 2. were argued orally and by brief before the Board. The legal advisor of the Board stated that the Board lacked competence to pass on these constitutional questions.

Mr. Ginocchi then brought an appeal to the Secretary of Education. There,

both questions were presented. On Question 1., the Secretary decided that there were no due process difficulties with what had transpired. The Secretary pointed to other decisions where similar facts had been found not to violate due process and indicated that school boards must take positions on demotions prior to hearings. On Question 2., the Secretary stated he lacked authority to decide the issue.

Subsequently, Questions 1. and 2. were brought to the Commonwealth Court of Pennsylvania. The Commonwealth Court denied relief on Question 1., stating that the Board's prior knowledge did not mean Mr. Ginocchi could not get a fair hearing. The Court also denied relief on Question 2., stating that the School Code is specific as to how demotions or suspensions are to be handled.

The Supreme Court of Pennsylvania was then asked to consider Questions 1. and 2., but it refused to allow an appeal.

(h) Statement of the reasons why the questions are substantial

(h1) Question 1.

At the heart of any due process hearing is the requirement of an impartial decision-maker. In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

Here, the Board first passed a resolution demoting Mr. Ginocchi and then subsequently sat in judgement on the correctness of the demotion in the hearing which it gave Mr. Ginocchi. This represents a grievous violation of Mr. Ginocchi's due process rights. Having taken a position in favor of the demotion, the Board was hardly in a position to judge the correctness of the demotion. Quite appropriate to these facts is the

following from National Labor Relations Board v. Phelps, 136 F.2d 562:

> The Board does not, indeed, it could not, contest the correctness of the principle respondents invoke, for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier by impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.

The reception which Mr. Ginocchi has received throughout the levels of review in Pennsylvania has been an unwillingness to see anything wrong in what has transpired and an insensitivity to the fact that, in this instance, the

Board voted in favor of the demotion, before acting as the adjudicating body in the hearing. Remarkably, both the Secretary of Education and the Commonwealth Court, in their opinions reproduced in the Appendix, seem to overlook the significance of the vote in favor of the demotion, made before the hearing. Their reliance on the Lomas decision, while sympathetic to the School Board, does not come to grips with the underlying due process difficulty with what has transpired. The Supreme Court of the United States represents the last chance Mr. Ginocchi has to secure one of the most fundamental of his rights under the Constitution, the right to a hearing before a previously uncommitted adjudicator.

(h2) Question 2.

Throughout the proceedings in

Pennsylvania, Mr. Ginocchi has pointed out that School Code Section 1151 on demotions, while requiring a hearing, otherwise provides no guidance on such important matters as, for instance, what the causes for demotion may be (Mr. Ginocchi's protections would have been far greater if he would have been treated under the part of the school code relating to suspensions), or, where, as here, in the case of a cause not relating to a specific individual (in this case, the cause was "decline in enrollment"), how it should be decided who to demote. Mr. Ginocchi pointed out that, while in his case, he was chosen from a restricted group within the administration (elementary school principals) on the basis of seniority within that group, the person chosen in another school district within Pennsylvania was selected on the

basis of ranked ability. Kept in the administration in Mr. Ginocchi's case was an individual of lesser seniority; he was not an elementary school principal.

Among the decisions Mr. Ginocchi has continuously pointed to on Question 2. are Connelly, Giaccio, and Grayned as follows:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Connelly v. General Construction Co., 269 U.S. 385,391.

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves ... judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. Giaccio v. Pennsylvania, 382 U.S. 399, 15 L.Ed.2d 447.

> Vague laws offend several important values .... Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Grayned v. City of Rockford, 408 U.S. 104, 33 L.Ed.2d 222,227.

While Mr. Ginocchi continuously brought up this Question 2. at all levels within Pennsylvania, the only decision he ever got was from the Commonwealth Court in the form of the following two otherwise unsupported sentences:

> In addition, the standards to be applied by the Board are not void for vagueness. The School Code is specific as to how demotions or suspensions are to be handled.

This statement of the Commonwealth Court, while true at a superficial level in that Section 1151 specifically requires

that a hearing be held, in no way comes to grips with the due process difficulties of this otherwise vague law. The Supreme Court of the United States is Mr. Ginocchi's last resort in his desire to have the benefit of due process of law granted him by the 5th and 14th Amendments to the Constitution of the United States. In our system of government, due process of law is one of the most substantial questions we have to deal with. Certainly, Mr. Ginocchi deserves deeper consideration of the points he has raised than has been given him by the judicial system of Pennsylvania.

Respectfully submitted

Daniel A. Sullivan Jr.

(j) Appendix

(ji) Copy of the order of the court whose decision is sought to be reviewed

The Supreme Court of Pennsylvania entered the following Order on Mr. Ginocchi's Petition for Allowance of Appeal, in No. 497 W.D. Allocatur Docket, 1985: "Petition denied. Per Curiam 1/23/86".

(jii) Other statements by courts or administrative agencies in the case Resolution of July 14, 1980, by the Board of the Burrel. School District

"Resolved,

That upon recommendation of our Superintendent, Charles Huston, Anthony Ginocchi be demoted from Elementary Principal to that of a teacher for the following reason:

Decrease in student enrollment from 1,785 students in the 1974-75 school

year to a projected 1,213 students in the 1980-81 school year.

That a written notice ... be sent to him informing him of the demotion and the reason therefor, and further if he does not consent, that a hearing be scheduled ...."

Outcome of the hearing held before the Board on August 21, 1980, and Sept. 4, 1980

"I will make a motion to sustain the demotion of Mr. Ginocchi based upon the information we have heard in the last two weeks."

There were seven yeses and one no, and one absent.

Opinion of the Secretary of Education, July 9, 1982, in Appeal of Anthony L. Ginocchi, No. 23-80

On Question 1.:

"The Appellant next argues

that the school board violated his due process rights by first passing a resolution demoting him and then subsequently sitting in judgment on the propriety of the demotion. On July 14, 1980, the school board adopted the following resolution:

[Resolution appears above]

The board's resolution was followed by a letter dated July 15, 1980 from the president of the school board informing the Appellant of his demotion and offering the Appellant a hearing. The Appellant claims that the passage by the board of the resolution demoting him followed by the same board's adjudication of the case denied him due process of law. The basis of the Appellant's argument appears to be that the hearing accorded to him was unfair because the board members

had already formed an opinion as to the outcome of the case.

The issue raised by Appellant was recently discussed in Lomas v. Board of School Directors of Northwestern Lehigh School District, (Pa. Commw. Ct., May 7, 1982), a case in which a committee of the school board gathered information concerning the activities of an employee prior to the public hearings on the employee's demotion. The court in Lomas, when confronted with the argument that the teacher was denied due process, stated as follows:

> Moreover, Section 1151 of the Public School Code expressly envisions that a professional employee may be requested to consent to a demotion and, if such consent is obtained, no hearing is required. We are at a loss to understand the means by which a board of school directors is to acquire the information it needs to determine whether to request consent to a demotion, thereby obviating the need for a

> hearing, if it is required to be unfamiliar with the facts prior to the hearing itself.

The fact that the members of the school board had knowledge of the circumstances surrounding the Appellant's demotion prior to the Appellant's hearing is not sufficient reason for overturning the action taken by the school board. Spruce Hill Township School District v. Bryner, 148 Pa. Super. 549, 25 A.2d 745 (1948). As noted in Spruce Hill Township all that is required of members of a school board is that they "... hear and determine the charges against appellant on the evidence before them, uninfluenced by other previous impressions.

In the present case, Appellant argues generally that he was denied due process of law because of the procedure employed by the board. The appellant cites no specific examples of bias and

prejudice on the part of individual board members which showed they were unable to determine whether to demote the Appellant on the basis of the evidence presented to them. We hold that the procedure employed by the school board in demoting the Appellant did not violate the Appellant's right to due process of law."

On Question 2., the Secretary held that he lacked authority to determine whether Section 1151 is unconstitutionally vague.

Opinion of the Commonwealth Court issued May 3, 1985, in No. 1914 C.D. 1982

"The constitutional rights of the petitioner were not violated because the Board had prior knowledge of the facts before it made an adjudication. Under Section 1151 of the Code, the Board has a duty to acquire information prior to advising the petitioner concerning his

desire for a hearing. Such prior knowledge does not mean that petitioner could not get a fair hearing. Lomas v. Board of School Directors of Northwestern Lehigh School District, 66 Pa. Commonwealth Ct. 421, 444 A.2d 1319 (1982). In addition, the standards to be applied by the Board are not void for vagueness. The School Code is specific as to how demotions or suspensions are to be handeled. Affirmed."

(jiii) Decree appealed from

The decree appealed from is reproduced in (ji) above.

(jiv) Copy of the notice of appeal

The notice of appeal to the Supreme Court of the United States was filed Mar. 12, 1986, in the Supreme Court of Pennsylvania. It read as follows:

> Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Anthony L. Ginocchi hereby gives notice

that he is appealing to the Supreme Court of the United States from the decision of the Supreme Court of Pennsylvania dated 1/23/86 denying him relief from injustices which he has suffered. This appeal is taken under 28 U.S.C. Section 1257.